IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RELIANCE INSURANCE COMPANY and AUTO DRIVEAWAY CO.,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	NO. 99-CV-5076
FEDERAL INSURANCE COMPANY, HANCOCK BANK OF MISSISSIPPI and HANCOCK BANK OF LOUISIANA,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J. NOVEMBER 3, 2000

Before this Court are Cross Motions for Summary Judgment filed by Plaintiffs Reliance Insurance Company ("Reliance") and Auto Driveaway Company ("Driveaway"), and Defendants Federal Insurance Company ("Federal"), and Hancock Bank of Mississippi and Hancock Bank of Louisiana (collectively "Hancock"). For the reasons that follow, the Plaintiffs' Motion is denied and the Defendants' Motion is granted.

I. BACKGROUND.

Hancock is in the business of, among other things, making automobile loans. On or about December 26, 1996, Hancock engaged the services of Driveaway to deliver a 1996 Chevy Cavalier which it had repossessed from a defaulting customer, Donna Stillerman ("Stillerman"), to Hancock's offices in Mississippi. Driveaway hired Ahammad A.J. Sulayman ("Sulayman")

to deliver the car. The terms of the agreement between Driveaway and Hancock are contained in a Shipping Order and Freight Bill (the "Order") prepared by Driveaway. On or around January 31, 1997, Sulayman, while driving the car, collided with a bus owned by Southeastern Pennsylvania Transportation Authority ("SEPTA"). Several SEPTA passengers were injured as a result of the accident, and thereafter filed numerous lawsuits seeking compensation for their injuries in the Court of Common Pleas in Philadelphia, Pennsylvania against SEPTA, Sulayman, Driveaway, Hancock, and others (hereinafter "the underlying action"). SEPTA joined Hancock as an additional defendant, alleging that Hancock was responsible for the accident due to negligent operation of the car or for negligent entrustment of the vehicle to Driveaway and Sulayman.

At the time of the accident, Driveaway was covered under a commercial auto insurance policy issued by Reliance, which provided $3,000,000.00 in liability coverage for "non-owned" autos. Hancock was covered under a commercial auto insurance policy which was provided by Federal, with a $1,000,000.00 limit of liability coverage for "any auto." Reliance assigned counsel to defend Driveaway and Sulayman in the underlying action, and Federal assigned counsel to defend Hancock. During discovery, Reliance and Federal each agreed to contribute 50% toward the settlement of the claims and the

satisfaction of any arbitration awards, but did not waive their rights to seek indemnity from each other.

Reliance filed the instant action on October 14, 1999, seeking a declaratory judgment that Federal is responsible under its insurance policy issued to Hancock for primary coverage and defense of all actions filed in connection with the accident, and that Reliance is entitled to reimbursement for all costs and expenses incurred in its defense of the underlying action.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact.[1] Big Apple BMW, Inc. v. BMW of North

[1] "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of

America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Further, "when there are cross-motions, each motion must be considered separately, and each side must still establish a lack of genuine issues of material fact and that it is entitled to judgment as a matter of law." Nolen v. Paul Revere Life Ins. Co., 32 F. Supp.2d 211, 213 (E.D. Pa. 1998).

III. DISCUSSION.

"[T]he interpretation of an insurance policy is a question of law for the court." Bowers v. Feathers, 671 A.2d 695, 697 (Pa. Super. 1995)(citing State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co., 657 A.2d 1252, 1254 (1995)). "Whether a particular loss is within the coverage of an insurance policy is . . . a question of law and may be decided on a motion

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Professional Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D. Pa.) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

for summary judgment in a declaratory judgment action." Id. Summary judgment may be entered where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. (citing Hoffmaster v. Harleysville Ins. Co., 657 A.2d 1274 (Pa. Super.), app. denied, 668 A.2d 1133 (1995)).

"When interpreting a contract of insurance it is necessary to consider the intent of the parties as manifested by the language of the instrument. Where the policy language is clear, the contract will be applied as written." Id. (citing Insurance Co. of the State of Pennsylvania v. Hampton, 657 A.2d 976, 977-978 (1995)(citation omitted)). "[A]n insurance policy must be read as a whole [by the court] and construed according to the plain meaning of its terms." Diamond State Ins. Co. v. Ranger Ins. Co., 47 F.Supp.2d 579, 583 (E.D. Pa. 1999)(citing C.H. Heist Caribe Corp. v. American Home Assurance Co., 640 F.2d 479, 481 (3d Cir. 1981)). Where a provision of a contract of insurance is ambiguous, the provision must be construed in favor of the insured, and against the insurer, the drafter of the contract. Id. (citing Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983)). However, "a court should read policy provisions to avoid ambiguities, if possible, and not torture the language to create them." Id. (citing St. Paul Fire & Marine Ins. Co. v. United States Fire

Ins. Co., 655 F.2d 521, 524 (3d Cir. 1981)).

The parties agree that no factual issues remain in this case, but rather the only issues remaining concern the interpretation of the agreement between Driveaway and Hancock, and of the insurance policies issued by Reliance and Federal.

A. Agreement between Driveaway and Hancock.

Plaintiffs claim that pursuant to the terms of the Order, which constitutes the agreement between Driveaway and Hancock,[2] Driveaway was entitled to primary coverage under the Federal policy. Specifically, Plaintiffs cite to Paragraph 7 of the Order, found on the reverse side of the Order, which provides that

> 7. Should Carrier be liable on account of loss or damage, it shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not void the policies or contracts of insurance, provided that Driveaway reimburses the claimant for the premium paid thereon applicable to the time during which the vehicle is in Carrier's care, custody and control.

(Shipping Order and Freight Bill at ¶ 7.) Plaintiffs interpret the phrase "full benefit" to mean primary coverage.

Defendants, however, argue that Paragraph 7 of the Order does not require nor permit Federal to be responsible for providing primary coverage for Driveaway. Defendants interpret

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[2] While Defendants claim that Hancock never received nor signed the agreement, they do not argue that it is an invalid agreement between the parties in their motion.

the language of Paragraph 7 to mean that Driveaway is entitled to the "full benefit" of any insurance on the "property," i.e., the vehicle, only in the event of "loss or damage," i.e., theft of the car or physical damage to it. Defendants argue that the clause is susceptible to this meaning alone because it makes no reference to Driveaway being entitled to primary coverage for "bodily injury" or "property damage." Accordingly, Defendants argue that Driveaway is only entitled to the full benefit of any comprehensive or collision auto insurance that Stillerman might have purchased that was in effect at the time of the loss.

We disagree. According to the plain language of the Order, Driveaway is entitled to the full benefit of any insurance effected upon the auto in the event that Driveaway was liable on account of loss or damage. We are not persuaded by Defendants' restrictive reading of the language of the Order which would limit Driveaway's coverage to only theft of the auto or physical damage to it.[3] There is nothing in the Order which suggests such

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[3] Defendants also argue, without citation to any authority, that the Order does not require Federal to provide Driveaway with primary coverage since the condition precedent that Driveaway reimburse Hancock for any premiums it paid to purchase the Federal policy has not been met. Plaintiffs correctly point out that since Driveaway cannot satisfy the condition precedent until Federal apprises it of the amount owed in premiums, and since Federal may therefore frustrate its performance under the contract, it should not be construed as a condition precedent. Moreover, Defendants do not even assert that Federal notified Driveaway of the amount owed.

Further, Defendants erroneously argue that because the meaning of the Order has been interpreted differently by

a qualification of the terms "loss" and "damage." Accordingly, we conclude that the language of the Order directs the interpretation that it includes claims for personal injury such as those filed in the underlying action. The Order does not, however, clearly dictate that Driveaway is entitled to primary coverage under the Federal policy. Accordingly, we must turn to the language of the Federal and Reliance policies to determine the scope of coverage to which the parties are entitled.

B. Who is an Insured under the Reliance and Federal Policies?

"To determine which party owes a duty to defend and to provide primary coverage, the Court must ascertain who is an insured under the parties' respective policies, the scope of the coverage as to each insured, and whether the factual allegations within the underlying complaint potentially fall within that scope." Diamond, 47 F.Supp.2d at 584. We will address the Federal and Reliance policies individually.

Driveaway and Hancock, it must be ambiguous. However, "disagreement between the parties over the proper interpretation of a contract does not necessarily mean that a contract is ambiguous." 12th Street Gym, Inc. v. General Start Indemnity Co., 93 F.3d 1158, 1165 (3d Cir. 1996)(citing Vogel v. Berkley, 354 Pa.Super. 291, 511 A.2d 878, 881 (1986)). But a contract is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Id. (quoting Steele v. Statesman Ins. Co., 530 Pa. 190, 607 A.2d 742, 743 (1992)). The terms "loss" and "damage" are not reasonably susceptible of Defendants' proposed limitations absent some sort of qualifying language.

1. The Federal Policy.

The Federal policy contains a "Liability Coverage" section which states:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."

(Federal Policy, Section II (A)). The parties do not dispute that Hancock, as the owner of the car, is entitled to primary coverage under the Federal policy. However, Plaintiffs argue that Federal must provide primary liability coverage for Driveaway as well as Hancock, because Driveaway is an "insured" under Hancock's policy with Federal. In support of this contention, Plaintiffs cite to Section II A(1) of the Federal policy, entitled "Who is an Insured," which states, in relevant part:

> The following are "insureds":
>
> a. You for any covered "auto."
>
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow . . .

(Federal Policy, Section II (A)(1)(a-b)). Plaintiffs claim that since Driveaway drove the car with Hancock's permission under a contract authorizing Driveaway to drive the car to a place directed by Hancock, Federal must provide primary liability coverage to Driveaway as an insured under Section II(A)(1)(a-b) of its policy. Defendants do not dispute this argument, and

there are no issues as to whether the car was a “covered auto” owned by Hancock which Driveaway had permission to drive. Therefore, the fact that Driveaway was a permissive user of the car clearly qualifies it as an insured within the meaning of the Federal policy. See Diamond, 47 F.Supp.2d at 584-585 (interpreting identical policy provision as in the instant case and holding that driver who, with insured’s permission, was operating a covered truck leased by insured at the time of the accident also qualified as an insured).

2. The Reliance Policy.

Reliance’s policy contains a “Liability Coverage” section which is identical to that contained in the Federal policy, which states:

> We will pay all sums an “insured” legally must pay as damages because of “bodily injury” or “property damage” to which this insurance applies, caused by an “accident” and resulting from the ownership, maintenance or use of a covered “auto.”

(Reliance Policy, Section II (A)(1)(a)). The policy also contains a section entitled “Who is an Insured” which provides, in pertinent part:

> The following are “insureds”
>
> C. Anyone liable for the conduct of an “insured” described above but only to the extent of that liability.

(Reliance policy, Section II(A)(1)(c)).

The parties agree that Driveaway and Stillerman are

insureds under the Reliance policy and are therefore entitled to coverage. Defendants, however, also assert that Hancock is an insured under Reliance's policy. Specifically, Defendants argue that Hancock is entitled to coverage because in the underlying complaints, Hancock was alleged to be liable for the conduct of both Driveaway and Sulayman. Accordingly, Defendants claim that Hancock is an insured under Section II(A)(1)(c) of the Reliance policy, and that it was therefore entitled to coverage since the auto accident caused by Sulayman was an "accident" which involved "bodily injury" as required by Section II(A)(1)(a) above, which governs coverage of insureds.

Plaintiffs do not address this argument. Rather, they merely reiterate their assertion that the Federal and Reliance policies make clear that each company intended to provide primary coverage for vehicles owned by their insureds, and excess coverage for their insureds for vehicles they do not own.[4] Again we find that the policy language is clear and that Hancock qualifies as an insured under the Reliance policy as an entity which was vicariously liable for the conduct of Driveaway and Sulayman, Reliance's insureds. See Diamond, 47 F.Supp.2d at 585 (interpreting identical policy provision as in the instant case

[4] Defendants are in agreement that this was the insurers' intention, but, as will be discussed later, argue that once Hancock qualified as an insured under the Reliance policy, it became entitled to primary coverage as the owner of the car.

and holding that lessor of trucking Trip Lease, who was vicariously liable through an insured, qualified as an insured as well).

C. <u>Priority of Coverage Among the Parties</u>.

Having established the status of the parties under the respective insurance policies, we now turn to the question of the extent of coverage to which they are entitled under the policies. The Reliance and Federal policies both contain the following identical "Other Insurance" clause:

> a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you do not own, the insurance provided by this Coverage Form is excess over any other collectible insurance . . . .
>
> d. When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the portion that the Limit of Insurance or our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

Because Driveaway does not own the car, Plaintiffs interpret the "Other Insurance" clause to mean that Reliance is not the primary, but the excess insurer of Driveaway, since the policy provides that "[f]or any covered 'auto' you don't own, the insurance provided . . . is excess . . . ." Further, the Plaintiffs interpret the "Other Insurance" clause in Federal's policy issued to Hancock, which states that "[f]or any covered 'auto' you own, this Coverage Form provides primary insurance," to mean that Federal must provide Hancock primary insurance,

since Hancock owns the auto. Defendants are in accord with these contentions. However, Plaintiffs claim that since Driveaway is an insured under the Federal policy, Federal is obligated to provide primary coverage to Driveaway as well as Hancock.[5]

Defendants, on the other hand, claim that pursuant to the above provision, Hancock, as owner of the vehicle, is entitled to concurrent primary coverage under both the Reliance and Federal policies. They further assert that Driveaway, as a "non-owner" insured, was entitled to only excess coverage under both policies. In other words, Defendants claim that the policies provided concurrent primary coverage to Hancock and concurrent excess coverage to Driveaway.

We are not persuaded by the Plaintiffs' argument that Driveaway, as an insured under Federal's policy, is entitled to

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[5] Plaintiffs also argue that because "[f]ive previous arbitration awards have expressly found that . . . (Federal) has primary coverage and defense responsibility in connection with the accident from which this litigation ensues," Defendants should be collaterally estopped from arguing that they do not have primary coverage and defense responsibility. (Pls.' Mem. Law Support Summ. J. at 5). In support of this contention, Plaintiffs provide five documents entitled "Report and Award of Arbitrators" which contain various versions of the statement "the liability insurance coverage on the Hancock Bank vehicle is primary for this accident." (Pls.' Mot. Summ. J., Ex. C). However, Plaintiffs have not established that the construction of the "Other Insurance" clauses was even an issue before the arbitration panels. Moreover, as discussed above, Hancock was covered under the Reliance policy as well as the Federal policy. Because one of the requirements of collateral estoppel is that the issue decided in the prior litigation be identical to that presented in the subsequent action, this argument is without merit.

primary coverage from Federal. The Federal policy does not require that Federal provide primary coverage to everyone who qualifies as an insured under the policy. Rather, the "Other Insurance" clause makes clear that Federal intended only to provide primary coverage to those of its insureds who owned covered autos.[6] Under the Federal policy, Driveaway, as a non-owner insured, was entitled only to excess coverage.

On the other hand, Hancock is entitled to primary coverage under the "Other Insurance" clause of the Reliance policy, as an insured who owns a covered auto. However, Defendants correctly note that this would yield an impossible result. Under the language of the two policies, Hancock is entitled to primary coverage under both the Reliance and the Federal policies, and Driveaway is entitled to excess coverage under both policies.

Defendants cite to Hoffmaster v. Harleysville Ins. Co., 657 A.2d 1274 (Pa. Super.), app. denied, 668 A.2d 1133 (1995), in which the Pennsylvania Superior Court was faced with a similar predicament. In that case, the driver of a car who collided with another driver had an insurance policy with a liability limit of $50,000.00. Id. at 1275. The owner of the

[6] Indeed, Plaintiffs' argument that Reliance must only provide excess insurance to Driveaway as a non-owner according to the "Other Insurance" clause in the Reliance policy clearly demonstrates their understanding of this distinction.

car had an insurance policy with a liability limit of $100,000.00. Id. Without conceding liability, the driver's insurer paid $5,000.00 and the owner's insurer paid $25,000.00 to fund settlement of the claim. Id. Thereafter, the driver's insurer filed an action for declaratory judgment against the owner's insurer seeking indemnity and defense costs incurred in the underlying lawsuit. Id. at 1276. The parties filed cross motions for summary judgment. Id.

Both the driver's and the owner's policies would provide coverage to the driver in the absence of any other applicable insurance. Id. at 1275. Both policies also contained nearly identical "Other Insurance" clauses, which are also virtually identical to those in the instant case, which provided:

> If there is other applicable insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

Id.

Adopting the rule applied by other jurisdictions, the court held that "irreconcilable 'other insurance' clauses in automobile liability insurance policies are to be disregarded as mutually repugnant thereby rendering each of the coverages to be treated as primary insurance." Id. at 1277. Accordingly, the court decided that the insurance companies should be made to share equally in the loss. Id. at 1282.

Plaintiffs argue that Hoffmaster is not on point in

this action because the court

> did not address the distinction between owned versus non-owned autos and the effect of the word "you" on the parties' intentions and the construction of the Other Insurance clauses, because the issue was not raised before the lower court. Had the Hoffmaster court considered the impact of the word "you" on the Other Insurance clauses, a clear distinction between owned and non-owned autos would have become evident and the clauses would have been able to be reconciled with each other. Once this Court reviews the Other Insurance clauses in their entirety, taking into account the impact of the word "you," it will become clear that both Reliance and Federal intended that they be primary insurers for vehicles they own, and excess insurers for vehicles they do not own.

(Pls.' Reply Defs.' Mot. Summ. J. at 2).[7]

However, this assertion is incorrect. The Hoffmaster court noted the driver's insurer's argument that if read correctly, the "Other Insurance" clauses did not conflict, and that the definition of "you" stated in both policies led to the conclusion that only the driver's insurer intended to provide excess insurance to the driver. Hoffmaster, 657 A.2d at 1277. The court stated that the driver's insurer had not explained how construction of the word "you" affects the construction of the "Other Insurance" clauses, but deemed the argument waived as not

[7] In a brief and somewhat confusing portion of their brief, Plaintiffs argue that since insurance policies are between the company and the "insured", not between insurance companies, the word "you" in the Other Insurance clauses is "clearly intended to mean the insured." (Pls.' Reply Defs.' Mot. Summ. J. at 3). Defendants do not take issue with this assertion, however. Rather, Defendants' focus on is the scope of the coverage promised to the insureds in the clauses.

raised before the trial court. Id. However, the court went on to state that "[e]ven if review of the policies' definitions were appropriate at this juncture we decline to delve into such semantic microscopy." Id. Accordingly, the court determined that the only way to achieve its goal of maintaining the status quo, it must "abandon[] the search for the mythical 'primary' insurer and insist[] instead that both insurers share in the loss." Id. (quoting Carriers Ins. Co. v. American Policyholders Ins. Co., 404 A.2d 216, 218 (Me. 1979)). Therefore, the court upheld the trial court's decision to hold each party equally responsible for the loss. Id. at 1282.

We are persuaded by the Superior Court's reasoning in Hoffmaster, and conclude that the appropriate remedy in this case is for the parties to share the loss equally. Each party contributed 50% in the underlying litigation. The Defendants' Motion for Summary Judgment is therefore granted.

An appropriate Order follows.